

State Takeover Statutes and a Proposal to Amend the Williams Act

I. INTRODUCTION

Since 1968, the federal government has been concerned with the rash of business takeovers and their impact on the shareholders of acquired companies. Congress believed that these shareholders were not being properly informed about their options and were being forced to sell their shares out of fear that they would not receive adequate compensation if they waited for a better offer.¹ In response to these concerns, Congress adopted amendments to the Securities Exchange Act of 1934 (Exchange Act)² to provide time and protection for shareholders of target corporations. These amendments, known as the Williams Act,³ provided reporting and time requirements that an acquiring company must follow during the takeover process. Since the enactment of the Williams Act, many states have adopted their own form of takeover legislation. In three recent cases, state statutes have been challenged on the grounds that these statutes are preempted by the Williams Act and violate the commerce clause of the Constitution. The Illinois takeover statute was challenged in *Edgar v. MITE Corp.*⁴ The Indiana statute was challenged in *CTS Corp. v. Dynamics Corp. of America*.⁵ Ohio's Control Share Acquisition Act⁶ has been challenged in *Fleet Aerospace Corp. v. Holderman*.⁷ One focus of this Note will be to use these challenges to illustrate the progressing state and judicial attitudes toward state antitakeover legislation.

This Note first looks at the policy behind the Williams Act amendments to the Exchange Act. The Illinois takeover law is then examined along with the Supreme Court's rationale in holding the statute unconstitutional. This Note then analyzes the Court's distinction between Indiana's takeover statute and the Illinois law. Ohio's takeover statute is then compared to both the Illinois and Indiana acts to determine if the Ohio statute is likely to be held constitutional. In addition, this Note discusses how states have circumvented the intent of the Williams Act with the blessing of the Supreme Court. Finally, this Note proposes amendments to the Williams Act aimed at ending this circumvention.

1. S. REP. NO. 550, 90th Cong., 1st Sess. (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2812 [hereinafter 1968 U.S. CODE NEWS].

2. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-kk (1982 & Supp. IV 1986)) [hereinafter Exchange Act].

3. The Williams Act of 1968, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78l-n (1982 & Supp. IV 1986)) (amending Exchange Act §§ 12-14(a), (c), and 16).

4. 457 U.S. 624 (1982).

5. 107 S. Ct. 1637 (1987).

6. OHIO REV. CODE ANN. § 1701.831 (Anderson 1982).

7. 796 F.2d 135 (6th Cir. 1986), vacated and remanded sub nom. *Ohio v. Fleet Aerospace*, 107 S. Ct. 1949 (1987).

II. THE WILLIAMS ACT

Prior to 1968, companies wanting to acquire other companies were required to register their offer under the Securities Act only if the offer was a stock-for-stock exchange.⁸ With cash offers, however, the acquiring company was not required to disclose information to the shareholders of the target company.⁹ The lack of information about the cash offer added to the shareholders' already difficult decision of whether or not to tender their shares.

In any takeover situation, the target's shareholders have several alternatives. First, the shareholders can tender all their shares with the hope that all the shares will be purchased. Second, if the offer is for less than all the shares, the shareholders can tender some of their shares. Third, they can wait and hope that another company, or the target company, will make a better offer. Here, shareholders run the risk of not being able to dispose of their shares. Fourth, they can hold on to the stock in anticipation that the acquiring corporation will make the stock even more profitable. Finally, the shareholders may take their shares into the marketplace and determine if they can receive a better offer. In each of these alternatives, the shareholders run the risk of not choosing the alternative that will provide the best return on their investment. The probability of an incorrect choice is increased when the shareholders have inadequate time and information to make their investment decision.

Congress was concerned that the shareholders of target companies did not have adequate time or information needed to decide rationally the best possible course of action.¹⁰ To address these concerns, Congress enacted the Williams Act. The Williams Act added to the Exchange Act sections 14(d)¹¹ and (e)¹² to regulate tender offers and sections 13(d)¹³ and (e)¹⁴ to establish disclosure requirements.¹⁵

The legislative history of section 13(d) states that "[t]he purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time."¹⁶ This section removes the nondisclosure problem previously arising in cash tender offers. Section 13(d) of the Exchange Act requires any person who acquires more than five percent of a class of securities registered under section 12 of the Exchange Act¹⁷ to file a 13(d)

8. 1968 U.S. CODE NEWS, *supra* note 1, at 2812. A stock-for-stock exchange occurs when the acquiring corporation exchanges stock in the acquiring corporation for stock in the target corporation at a fixed ratio. *See also* "Stock Swap," BLACK'S LAW DICTIONARY 1272 (5th ed. 1979).

9. 1968 U.S. CODE NEWS, *supra* note 1, at 2812.

10. *Id.*

11. 15 U.S.C. § 78n(d) (1982).

12. 15 U.S.C. § 78n(e) (1982).

13. 15 U.S.C. § 78m(d) (1982).

14. 15 U.S.C. § 78m(e) (1982).

15. *See* Fogelson, Wenig, & Friedman, *Changing the Takeover Game: The Securities and Exchange Commission's Proposed Amendments to the Williams Act*, 17 HARV. J. ON LEGIS. 409, 412 (1980); Note, *The Tender Offer: In Search of a Definition*, 43 WASH. & LEE L. REV. 901 (1986).

16. 1968 U.S. CODE NEWS, *supra* note 1, at 2818.

17. 15 U.S.C. § 78l (1982). Under § 12(g)(1), securities must be registered if traded on a national exchange or if the offering is for more than \$5 million and there are 500 or more subscribers. 15 U.S.C. § 78l(g)(1) (1982).

statement per schedule 13D.¹⁸ This statement must be sent, within ten days after the acquisition, to the Securities and Exchange Commission (SEC), to the issuer of the securities at its principle executive office, and to each exchange on which the security is traded.¹⁹ This section applies to anyone who owns more than five percent of the class of stock being tendered before the acquisition, as well as to anyone who becomes the owner of more than five percent of the class as a result of the acquisition.²⁰ The required filing information includes:

(a) the background, identity, residence, and citizenship of the acquiror; (b) the source and amount of the funds to be used in the purchase; (c) the purpose of the purchase and any plans or proposals that the acquiror may have concerning possible liquidation of the issuer; (d) the number of shares of the security that the acquiror owns and the number of shares there is a right to acquire either by the acquiror or the acquiror's associate; and (e) information regarding contracts, arrangements, or understandings with any party concerning any of the shares of the issuer.²¹

Section 14(d)(1) requires an offeror who is attempting to acquire more than five percent of any class of equity security through the use of a tender offer to first file a schedule 14D-1 with the SEC.²² The schedule 14D-1 must include the source(s) of funds used to make the purchase of the target shares, any past transactions with the target corporation, and material financial information about the offeror.²³ Finally, section 14(d)(1) requires that the offeror publish or send a statement of the relevant facts contained in schedule 14D-1 to the shareholders of the target company.²⁴

Section 14(d) permits shareholders of the target company who have tendered their shares to withdraw their tender during the first seven days and after sixty days from the date the offer is first published or given to the target's shareholders.²⁵ If the offeror makes an offer to purchase less than all the outstanding shares of a class of the target's stock, securities tendered during the first ten days of the offer, or within ten days after notice of an increase in the offered consideration is first announced, must be purchased on a pro rata basis.²⁶ Also, if the offeror increases the amount of consideration paid for each security, those shareholders who tendered their shares before the increase must be paid the difference.²⁷

Section 14(e), applicable to all tender offers, prohibits any type of fraud, deception, or manipulation with respect to tender offers and gives the SEC the power to make rules reasonably designed to prevent such acts.²⁸ The SEC accordingly

18. Exchange Act § 13(d), 15 U.S.C. § 78m(d) (1982).

19. Exchange Act § 13(d)(1), 15 U.S.C. § 78m(d)(1) (1982).

20. *Id.*

21. Exchange Act § 13(d)(1)(A)-(E), 15 U.S.C. § 78m(d)(1)(A)-(E) (1982).

22. Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1982).

23. Schedule 14D-1. Tender Offer Statement Pursuant to § 14(d)(1) of the Securities Exchange Act of 1934, 17 C.F.R. § 240.14d-100 (1987).

24. Exchange Act § 14(d)(1), 15 U.S.C. § 78n(d)(1) (1982).

25. Exchange Act § 14(d)(5), 15 U.S.C. § 78n(d)(5) (1982). Rule 14d-7 added to the withdrawal rights so that now shareholders may withdraw their shares during the period the offer request or invitation remains open. Additional Withdrawal Rights, 17 C.F.R. § 240.14d-7(a) (1987). See *infra* text accompanying note 28.

26. Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6) (1982).

27. Exchange Act § 14(d)(7), 15 U.S.C. § 78n(d)(7) (1982).

28. Exchange Act § 14(e), 15 U.S.C. § 78n(e) (1982).

enacted rule 14e-1,²⁹ which requires that a tender offer must remain open for at least twenty business days from the time the offer is published or made to the security holders.³⁰ If the offeror increases the consideration to be paid for each security, the offer must remain open for ten business days from the time notice of the increase is given.³¹ If the offer is terminated or withdrawn, the tendered securities must be paid for promptly or returned.³² The SEC also enacted rule 14e-2,³³ under which, after making the offer, the management of the target company has ten business days to inform the shareholders whether management recommends that the shareholders accept or reject the offer.³⁴ Management, however, may state that it is remaining neutral or is unable to take a position, and the reasons therefore.³⁵

The structure of the Williams Act shows that Congress is concerned with balancing the shareholders' interests in having adequate information and time to make a decision with the offeror's interests in completing the transaction in the most efficient way. The remainder of this Note shows how state takeover statutes upset this balance.³⁶

III. THE ILLINOIS LAW AND *EDGAR V. MITE*

The Illinois takeover statute was the first takeover statute challenged in the United States Supreme Court. The case, *Edgar v. MITE Corp.*,³⁷ involved the MITE Corporation (MITE) and the Chicago Rivet and Machine Company. MITE initiated a tender offer for all of the outstanding shares of the Chicago Rivet and Machine Company. MITE filed the necessary documents with the SEC pursuant to the Williams Act, but did not comply with the Illinois Business Takeover Act (Illinois Act). MITE brought an action claiming that the Williams Act preempted the Illinois Act and also that the Illinois Act was unconstitutional as a violation of the commerce clause.³⁸

The Illinois Act required that a tender offeror notify the Secretary of State and the target corporation of the offeror's intent to make a tender offer and the terms and conditions of the offer twenty days before the offer became effective.³⁹ Within those

29. Unlawful Tender Offer Practices, 17 C.F.R. § 240.14e-1 (1987).

30. *Id.* § 240.14e-1(a).

31. *Id.* § 240.14e-1(b).

32. *Id.* § 240.14e-1(c).

33. 17 C.F.R. § 240.14e-2 (1987). (Position of subject company with respect to a tender offer.).

34. *Id.* § 240.14e-2(a)(1).

35. *Id.* § 240.14e-2(a)(2)-(3). Having management provide a good faith recommendation helps the shareholders since management has more information and knowledge of the corporation than the shareholders. See Booth, *Is There Any Valid Reason Why Target Managers Oppose Tender Offers?*, 14 SEC. REG. L.J. 43, 56 (1986). The shareholders would not spare the time or the expense to accumulate this information since shareholders have an incentive to remain passive. See *infra* text accompanying notes 122-25.

36. This Note purposefully ignores a state's intent behind promulgating a control share acquisition statute. A state's intent is irrelevant since this Note's concern is solely about whether the statute *in fact* violates the Williams Act.

37. 457 U.S. 624 (1982). For a more detailed analysis of the Illinois statute and the *MITE* decision, see Comment, *Tender Offers—Edgar v. MITE Corp. and State Tender Offer Regulation*, 9 J. CORP. L. 95 (1983); Note, *A Failed Experiment: State Takeover Regulation After Edgar v. MITE Corp.*, 1983 U. ILL. L. REV. 457.

38. *MITE*, 457 U.S. at 626-30.

39. ILL. REV. STAT. ch. 121 1/2, ¶¶ 137.54.E, 137.54.B (1979) (repealed 1983) (Supp. 1988); *MITE*, 457 U.S. at 634-35.

twenty days, the offeror was not permitted to communicate with the shareholders of the target corporation regarding the offer. The target company, however, was free to provide the shareholders with information concerning the impending offer. Also, a hearing had to be held if either a majority of the target's outside directors or ten percent of the Illinois shareholders of the class of securities subject to the offer requested it.⁴⁰

The Illinois Act also required registration of the tender offer with the Secretary of State.⁴¹ A tender offer became registered after the twenty days unless the Secretary of State called a hearing to adjudicate the substantive fairness of the offer.⁴² In the hearing, if the Secretary of State determined the offer to be unfair, the tender offer could not be consummated.

The statute defined a target company as a corporation in which either Illinois shareholders or a "specified company" owned ten percent of the class of securities targeted in the tender offer.⁴³ A specified company was defined as one that met any two of the following three conditions: the corporation had its principal office in Illinois, was organized under Illinois law, or had at least twenty percent of its capital and paid-in surplus represented within the state.⁴⁴

The Supreme Court found that Congress did not intend for the Williams Act to prohibit states from making their own statutes to regulate tender offers; it left the determination of the appropriateness of state regulation to the courts.⁴⁵ States may regulate only to the extent that their statutes do not conflict with federal statutes; and "[a] conflict will be found 'where compliance with both federal and state regulations is a physical impossibility . . . or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"⁴⁷ The Court held, in a plurality opinion, that the Illinois Act was both an obstacle to the purpose of the Williams Act⁴⁸ and a violation of the commerce clause.⁴⁹ There was no contention, however, that compliance with both the Williams Act and the Illinois statute was impossible.⁵⁰

The Supreme Court held three provisions of the Illinois Act inconsistent with the congressional objectives of the Williams Act. First, the Illinois Act required that the offeror notify both the Secretary of State and the target company of the terms of the offer twenty business days before the offer became effective. The Court held that this additional time provided incumbent management an unfair advantage since they would be able to coerce the shareholders into rejecting the offer even before it was presented to them. Congress refused precommencement disclosure requirements

40. ILL. REV. STAT. ch. 121 1/2, § 137.57.A (1979) (repealed 1983) (Supp. 1988); *MITE*, 457 U.S. at 627.

41. ILL. REV. STAT. ch. 121 1/2, § 137.54.A (1979) (repealed 1983) (Supp. 1988); *MITE*, 457 U.S. at 626-27.

42. ILL. REV. STAT. ch. 121 1/2, § 137.54.E (1979) (repealed 1983) (Supp. 1988); *MITE*, 457 U.S. at 627.

43. ILL. REV. STAT. ch. 121 1/2, § 137.52-10 (1979) (repealed 1983) (Supp. 1988); *MITE*, 457 U.S. at 627.

44. ILL. REV. STAT. ch. 121 1/2, § 137.52-10 (1979) (repealed 1983) (Supp. 1988); *MITE*, 457 U.S. at 627.

45. *MITE*, 457 U.S. at 631.

46. *Id.* (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)).

47. *Id.* (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978)).

48. *Id.* at 639.

49. *Id.* at 646.

50. *Id.* at 631-32.

several times before adopting the Williams Act.⁵¹ A twenty-day precommencement disclosure requirement already had been refused after the SEC stated that "the requirement of a 20 day advance notice to the issuer and the [Securities and Exchange] Commission is unnecessary for the protection of securities holders"⁵² Precommencement disclosure provides no additional benefit to the shareholders since they will not have any more time or information to help them make their decision.

Second, permitting the Secretary of State or the target's management to request a hearing introduced an undue delay into the tender offer process. The ability to delay provides incumbent management the potential to thwart the takeover since delay is "the most potent weapon in a tender offer fight."⁵³

Third, the Court held that the Williams Act forbade the provisions in the Illinois statute that allowed the Secretary of State to adjudicate the fairness of the offer. The Court noted that both the House and the Senate decided that it was ultimately the shareholders' decision whether an offer is fair and that the Williams Act only intended to provide shareholders enough time and information to make the best decision.⁵⁴ A fairness hearing by the Secretary of State would take the investment decision out of the hands of the shareholders and place it into the hands of the state.

In considering how the Illinois Act affected interstate commerce, the Court noted that not every exercise of state power with some impact on interstate commerce is invalid. The Court then applied the modern standard for state regulation stating that "[a] state statute must be upheld if it 'regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'"⁵⁵ The Court held that the Illinois Act violated this standard in two ways.

First, the Illinois Act could prevent interstate tender offers that would generate interstate transactions. The Illinois Act could be used to regulate a tender offer that did not affect a single Illinois shareholder "since the [Illinois] Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois law, or has at least 10 percent of its stated capital and paid-in-surplus represented in Illinois."⁵⁶ These provisions in the statute made the Illinois law applicable to some corporations even if they were not an Illinois corporation. The Court held that this attempt to exercise direct extraterritorial jurisdiction offended sister states and exceeded the limits of the state's power.⁵⁷

51. *Id.* at 635.

52. MEMORANDUM OF THE SECURITIES AND EXCHANGE COMM'N. TO THE COMM. ON BANKING AND CURRENCY, U.S. SENATE, ON S. 2731, 89th Cong., 2d sess., reprinted in 112 CONG. REC. 19,005 (1966).

53. *MITE*, 457 U.S. at 637 n.12 (quoting Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213, 238 (1977)).

54. *Id.* at 639-40.

55. *Id.* at 640 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960))).

56. *Id.* at 642.

57. *Id.* at 643.

Second, the Court held that the Illinois Act imposed a burden on interstate commerce in excess of any local interest. The Supreme Court noted that states traditionally have regulated *intrastate* securities transactions.⁵⁸ But the Illinois Act gave the state the power to block a nationwide tender offer.⁵⁹ The state had no legitimate interest in protecting out of state shareholders. Since the Illinois Act did not apply to a company purchasing its own shares, the target could make competing offers without complying with the Illinois Act—the act Illinois claimed was essential protection for investors.⁶⁰

The problems inherent in the Illinois Act provide a clear example of a state legislature going too far to protect its corporations. Indiana, on the other hand, enacted a protectionist statute that the Court held did not unduly affect interstate commerce.

IV. INDIANA CONTROL SHARE ACQUISITION ACT AND THE *CTS CORP. v. DYNAMICS CORP. OF AMERICA* DECISION

The Indiana Control Share Acquisition Chapter of the Indiana Business Corporation Law⁶¹ (Indiana Statute) was the second state takeover statute challenged in the Supreme Court.⁶² In March 1986 Dynamics Corporation of America (Dynamics) owned 9.6 percent of the common stock of the CTS Corporation. On March 10, Dynamics made a tender offer to purchase an additional one million shares, which would increase its holding to 27.5 percent. On March 27, the Board of Directors of CTS elected to be governed by the Indiana statute. Four days later, Dynamics filed a complaint against CTS alleging that the Williams Act preempted the Indiana statute and that the Indiana statute violated the commerce clause.⁶³ Both the district court⁶⁴ and the court of appeals,⁶⁵ citing the *MITE*⁶⁶ decision, held that the Indiana statute was preempted by the Williams Act and was a violation of the commerce clause. The United States Supreme Court reversed.⁶⁷ The Indiana statute appears to have been written to avoid the constitutional problems Illinois faced in the *MITE* decision.

The Indiana statute defines an "Issuing Public Corporation" as one with more than 100 shareholders, with its principal place of business, principal office, or substantial assets in Indiana, and with either more than ten percent of its shareholders as Indiana residents, or more than ten thousand shareholder residents in Indiana.⁶⁸

58. *Id.* at 641.

59. *Id.* at 643-44.

60. *Id.* at 644.

61. IND. CODE § 23-1-42 (1986).

62. For a more detailed analysis of the Indiana Statute and the *CTS* decision, see Comment, *Beyond CTS: A Limited Defense Of State Tender Offer Disclosure Requirements*, 54 U. CHI. L. REV. 657 (1987); Brown, Paley, and Richman, *Does CTS Mean New Life For State Takeover Statutes?*, NEW YORK LAW JOURNAL, July 27, 1987, at 21, col. 2.

63. *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1642 (1987).

64. *Dynamics Corp. of Am. v. CTS Corp.*, 637 F. Supp. 389 (N.D. Ill.), *aff'd*, 794 F.2d 250 (7th Cir. 1986), *rev'd*, 107 S. Ct. 1637 (1987).

65. *Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986), *rev'd*, 107 S. Ct. 1637 (1987).

66. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

67. *CTS*, 107 S. Ct. 1637 (1987).

68. IND. CODE § 23-1-42-4(a) (1986); *CTS*, 107 S. Ct. 1637, 1641 (1987).

Anyone who proposes to make a control share acquisition⁶⁹ must present an "acquiring person statement" at the issuing corporation's principal office.⁷⁰ The statement must be given pursuant to the Indiana statute and must set forth the identity of the acquiring person(s).⁷¹ Also, the statute requires an acquiring person to state the number of shares of the issuing corporation that the acquiring corporation and every member of its group owns, the range of voting power under which the acquisition falls, and, if the acquisition has not taken place, the terms of the acquisition and a statement that the acquisition is lawful.⁷² Finally, the acquirer must show that it has the financial capacity to make the acquisition.⁷³

After presentation of the acquiring person statement, a special shareholders meeting must be held to determine the voting rights that shares acquired in the control shares acquisition will be accorded.⁷⁴ The meeting is held at the next special or annual shareholders meeting unless the acquiring corporation requests a special meeting. This meeting must be held within fifty days after the request and at the expense of the acquirer.⁷⁵ The shareholders may vote to deny voting rights to the shares held or to be purchased by the acquiring person.

The Supreme Court held that the Indiana statute could be distinguished from the Illinois statute found unconstitutional in *MITE* in its regulation of takeovers and that these distinctions prevented the statute from being unconstitutional. The Supreme Court also dismissed the reasoning of the plurality opinion in *MITE*:

As the plurality opinion in *MITE* did not represent the views of a majority of the Court, we are not bound by its reasoning. We need not question that reasoning, however, because we believe the Indiana Act passes muster even under the broad interpretation of the Williams Act articulated . . . in *MITE*.⁷⁶

The Supreme Court found three major differences between the Indiana statute and the Illinois statute. First, the Illinois law provided for a twenty-day precommencement period while Indiana did not. In *MITE*, the Court had found that Congress explicitly rejected a precommencement notice requirement and that such precommencement notice provided management the ability to communicate unilaterally with the shareholders about the tender offer.⁷⁷

Second, the Illinois law had been criticized for allowing incumbent management an indefinite period in which to request a fairness hearing concerning the tender offer.⁷⁸ The Indiana statute has no similar provision. Since time is one of the most powerful weapons against a takeover attempt, allowing management to stall the

69. A control share acquisition generally occurs when an acquirer purchases enough shares in a corporation that, when added to all other shares of that corporation previously acquired by that acquirer, enables the acquirer to exercise direct control of the corporation through the voting power obtained. Control share acquisitions are specifically defined by state statute. See "Control Share Acquisition" defined in IND. CODE § 23-1-42-2 (1986).

70. IND. CODE § 23-1-42-6 (1986).

71. IND. CODE § 23-1-42-6(1),(2) (1986).

72. IND. CODE § 23-1-42-6(3)-(5) (1986).

73. IND. CODE § 23-1-42-6(5)(B) (1986).

74. IND. CODE § 23-1-42-7 (1986).

75. IND. CODE § 23-1-42-7(a),(b) (1986); *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637, 1642 (1987).

76. *CTS Corp. v. Dynamics Corp. of Am.* 107 S. Ct. 1637, 1645 (1987) (footnote omitted).

77. *Edgar v. MITE Corp.*, 457 U.S. 624, 635 (1982); see *supra* notes 43-44 and accompanying text.

78. *MITE*, 457 U.S. at 636-39.

procedure indefinitely, in effect, gives management the power to squelch the takeover. The Court, however, did note that not just *any* delay imposed by state regulation would conflict with the Williams Act, only unreasonable delay.⁷⁹

Third, the Supreme Court held that allowing the Secretary of State to rule on the fairness of the tender offer was inconsistent with the congressional objectives of the Williams Act.⁸⁰ Again, the Indiana statute has no such provision. Shareholders, not the Secretary of State, should decide the fairness of any tender offer. The Williams Act purported to provide shareholders with enough time and information to make the best decision possible.

The Supreme Court, in addition, held that the Indiana statute did not violate the commerce clause. Unlike the Illinois Act, the Indiana law affects both interstate and local business equally.⁸¹ That is, the Indiana Act does not impose a greater burden on out-of-state offerors than exists for Indiana offerors. The Indiana Act only applies to Indiana corporations while the Illinois Act had no such limitation. Therefore, all Indiana corporations are treated the same while non-Indiana corporations are not affected by the Indiana statute. The primary purpose of the Indiana statute is to protect Indiana shareholders. The Court held it does this by "affording shareholders, when a takeover offer is made, an opportunity to decide collectively whether the resulting change in voting control of the corporation, as they perceive it, would be desirable."⁸² The current challenge to Ohio's takeover statute is in the wake of the *MITE* and *CTS* decisions.

V. THE OHIO STATUTE AND *FLEET AEROSPACE V. HOLDERMAN*

On May 21, 1986, Fleet Aerospace, a Canadian corporation, made a nationwide tender offer to purchase any and all outstanding common stock of Aeronca, an Ohio corporation. On that same day, Fleet Aerospace filed an action in federal district court alleging the Ohio Control Share Acquisition Act⁸³ (Ohio Act) violated the commerce clause of the United States Constitution and was preempted by the Williams Act. Both the district court⁸⁴ and the court of appeals⁸⁵ held the Ohio Act unconstitutional in light of the *MITE* decision.⁸⁶

The Ohio Act applies to all Ohio corporations with a principal place of business, principal executive offices, or substantial assets in Ohio and having at least fifty shareholders.⁸⁷ Any person attempting a control share acquisition⁸⁸ must deliver an

79. *CTS*, 107 S. Ct. at 1647.

80. *MITE*, 457 U.S. 624, 639-40.

81. *CTS*, 107 S. Ct. at 1649.

82. *Id.* at 1651.

83. OHIO REV. CODE ANN. § 1701.831 (Anderson 1985).

84. *Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. 742 (S.D. Ohio), *aff'd*, 796 F.2d 135 (6th Cir. 1986), *vacated and remanded sub nom.* *Ohio v. Fleet Aerospace Corp.*, 107 S. Ct. 1949 (1987).

85. *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986), *vacated and remanded sub nom.* *Ohio v. Fleet Aerospace Corp.*, 107 S. Ct. 1949 (1987).

86. *Id.* at 139; 637 F. Supp. 742, 755-65 (S.D. Ohio 1986).

87. OHIO REV. CODE ANN. § 1701.01(A), (Y) (Anderson Supp. 1987).

88. A "control share acquisition" is the direct or indirect acquisition by any person of shares of an issuing public corporation that, when added to all other shares of the issuing public corporation held by the person, would entitle such

acquiring person statement to the issuing corporation at its principal executive offices.⁸⁹ The acquiring person statement must include the identity of the acquiring person and provide that the statement is given pursuant to the Ohio Act.⁹⁰ Also, the acquiring person must state the number of shares it owns, directly or indirectly, and the range of voting power under which the proposed control share acquisition would fall.⁹¹ Finally, the acquiring person statement must describe the terms of the control share acquisition and represent that the acquisition is not contrary to any law.⁹²

Within ten days after receipt of the acquiring person statement, the Ohio corporation must call a special meeting to vote on the proposed acquisition.⁹³ Such meeting must be held within fifty days after receipt of the statement.⁹⁴ The acquiring person may make the acquisition if a majority of the shareholders represented, in person or by proxy, approve the acquisition, and such acquisition is consummated within 360 days following the approval.⁹⁵

The Ohio Act, in most respects, is the same as the Indiana statute. The major difference is that while the shareholders under the Indiana statute vote to determine what voting rights, if any, the offeror's shares will have, the Ohio Act permits the target's shareholders to vote to deny the offeror the right to purchase any more shares.⁹⁶ At the time the Ohio Act was considered by the Sixth Circuit Court of Appeals, the *CTS* decision upholding the constitutionality of the Indiana statute had not yet been rendered, so the court held that the Ohio Act was unconstitutional in light of the *MITE* opinion.⁹⁷

The Court of Appeals for the Sixth Circuit held that Ohio's takeover statute was unconstitutional for two reasons. First, the court, relying on *Edgar v. MITE Corp.*,⁹⁸ held that Ohio's requirement of a shareholder vote allowed management to delay a takeover, and thus, the statute frustrated the objectives of the Williams Act.⁹⁹ Second, the court held that the Ohio law had a substantial impact on interstate commerce.¹⁰⁰ In its commerce clause analysis, the court focused on the Ohio Act's potential ability to regulate a tender offer that would not involve a single Ohio shareholder. The district court, in addition, had pointed out that the Act could

person immediately after the acquisition to directly or indirectly, alone or with others, to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges:

- (a) One-fifth or more but less than one-third of such voting power;
- (b) One-third or more but less than a majority of such voting power; or
- (c) A majority or more of such voting power.

OHIO REV. CODE ANN. § 1701.01(Z)(1) (Anderson 1985).

89. OHIO REV. CODE ANN. § 1701.831(B) (Anderson 1985).

90. OHIO REV. CODE ANN. § 1701.831(B)(1),(2) (Anderson 1985).

91. OHIO REV. CODE ANN. § 1701.831(B)(3),(4) (Anderson 1985).

92. OHIO REV. CODE ANN. § 1701.831(B)(5),(6) (Anderson 1985).

93. OHIO REV. CODE ANN. § 1701.831(C) (Anderson 1985).

94. OHIO REV. CODE ANN. § 1701.831(C) (Anderson 1985).

95. OHIO REV. CODE ANN. § 1701.831(E)(1),(2) (Anderson 1985).

96. Compare IND. CODE § 23-1-42-7 (1986) with OHIO REV. CODE ANN. § 1701.831(E)(1) (Anderson 1985).

97. *Fleet Aerospace Corp. v. Holderman*, 796 F.2d 135 (6th Cir. 1986), *vacated and remanded sub nom. Ohio v. Fleet Aerospace*, 107 S. Ct. 1949 (1987).

98. 457 U.S. 624 (1982).

99. *Fleet Aerospace*, 796 F.2d at 139.

100. *Id.*

regulate a transaction between two individuals for the sale of twenty percent of the stock in an Ohio corporation.¹⁰¹ For these reasons, the law was held unconstitutional.

Aeronca appealed. While *Fleet Aerospace* was on petition for certiorari, the Supreme Court decided *CTS*.¹⁰² The Supreme Court remanded *Fleet Aerospace* to the Sixth Circuit Court of Appeals for reconsideration in light of the *CTS* holding.¹⁰³ *CTS*¹⁰⁴ considered both of the issues addressed by the Sixth Circuit. It appears that if the district court, on further remand, does not hold the case moot,¹⁰⁵ the court of appeals will ultimately reverse its prior decision.

The basic difference between the Indiana Act and the Ohio Act is that Indiana shareholders may determine the voting rights of the shares held by the offeror while Ohio shareholders may deny the offeror the right to purchase the shares.¹⁰⁶ In Indiana, the offeror will not purchase any more shares since they will not have voting rights. In Ohio, the offeror will not purchase any more shares since it is forbidden. In effect, both statutes provide the same result.

But, is the fact that Ohio can stop the offeror from purchasing shares enough to make the law unconstitutional? *Fleet Aerospace*'s brief points to dicta in the *CTS*¹⁰⁷ decision which suggests that it might: "We reiterate that this [Indiana] Act does not prohibit any entity—resident or nonresident—from offering to purchase, *or from purchasing*, shares in Indiana corporations, or from attempting thereby to gain control."¹⁰⁸ Also, *CTS* held that the Indiana law did not frustrate the Williams Act since it did not "preclude an offeror *from purchasing shares* as soon as federal law permits."¹⁰⁹ This dicta, although interesting, will probably not save *Fleet Aerospace* from the *CTS* decision because the effect of the Indiana and Ohio statutes is the same. A majority of a quorum of disinterested shareholders may stop a potential takeover by voting against it. In Indiana, the shareholders make the acquirer's shares, both owned and to be purchased, practically worthless by taking away their voting privileges; while in Ohio, the shareholders may forbid the sale of stock to the acquirer. The major complaints against the Ohio Act, namely that the Ohio Act tips the balance in favor of incumbent management, and constitutes a direct regulation of, as well as an indirect burden on interstate commerce, already were addressed by the Supreme Court in *CTS*.¹¹⁰ Is this the result intended by the Williams Act? As will be

101. *Fleet Aerospace*, 637 F. Supp. at 760–61 *aff'd*, 796 F.2d 135 (6th Cir. 1986), *vacated and remanded sub nom.* *Ohio v. Fleet Aerospace*, 107 S. Ct. 1949 (1987).

102. 107 S. Ct. 1637 (1987).

103. *Ohio v. Fleet Aerospace*, 107 S. Ct. 1949 (1987). Recently, the Sixth Circuit Court of Appeals remanded the case to the district court to be decided on mootness grounds since the parties settled the takeover dispute. *Fleet Aerospace v. Holderman*, 848 F.2d 720 (6th Cir. 1988).

104. 107 S. Ct. 1637 (1987).

105. See *supra* note 103.

106. Compare IND. CODE §§ 23-1-42-7, -9 (1986) with OHIO REV. CODE ANN. § 1701.831 (Anderson 1985).

107. 107 S. Ct. 1637 (1987).

108. Appellee's Brief at 5, *Fleet Aerospace Corp. v. Holderman*, 848 F.2d 720 (6th Cir. 1988) (No. 86-3533) (citing *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987)) (emphasis added) (on file at the Ohio State Law Journal).

109. *CTS*, 107 S. Ct. 1637, 1647 (1987) (emphasis added).

110. See *supra* text accompanying notes 78–82.

seen, the *CTS*¹¹¹ and *Fleet Aerospace*¹¹² decisions each give states increased power to protect its businesses at the expense of the shareholders—clearly not the intent of the Williams Act.

VI. STATE AND JUDICIAL CIRCUMVENTION OF THE WILLIAMS ACT

Both the Indiana and Ohio acts permit a majority of a quorum of disinterested shareholders to make a decision affecting whether all shareholders may sell their stock to the acquirer. The Supreme Court exalted the benefits of such group decision making in *CTS* stating that “[i]n such a situation under the Indiana Act, the shareholders as a group, acting in the corporation’s best interest, could reject the offer, although individual shareholders might be inclined to accept it.”¹¹³ This disturbing language is inconsistent with the intent of the Williams Act. This Part will review the legislative history of the Williams Act and propose amendments to the Williams Act aimed at preventing states and courts from circumventing this intent.

A. *The Intent of the Williams Act*

As emphasized above, states and courts have sought group decision making in order to promote a course of action in the corporation’s best interest. Nothing in the Williams Act seeks to protect the corporation’s best interest. The Williams Act was enacted to ensure that individual shareholders are provided adequate information necessary to make an informed investment decision whether to sell or retain their shares.¹¹⁴ The legislative history implies that the Williams Act was designed to protect the investor and provide each investor with adequate time and information to make the best investment decision for the investor. The best investment decision for each investor individually is not necessarily the best course of action for the corporation.

The legislative history provides evidence of Congress’ intent to give each investor the chance to do what is best for himself or herself. For example, the legislative history explains that “the investment decision—whether to retain the security or sell it—is in substance little different from the decision made on an original purchase of a security or on an offer to exchange one security for another.”¹¹⁵ The legislative history constantly refers to the shareholder as an investor making an investment decision. An investment decision means the best course of action for the investor, even if it is at the expense of the corporation. It is unlikely the shareholder/investor initially purchased the security to benefit the corporation: the decision was made to profit the investor. Similarly, the decision whether to retain or sell the security during a takeover situation should be made on the same basis.

111. 107 S. Ct. 1637 (1987).

112. 796 F.2d 135 (6th Cir. 1986), *vacated and remanded sub nom.* Ohio v. Fleet Aerospace, 107 S. Ct. 1949 (1987).

113. *CTS*, 107 S. Ct. at 1646 (emphasis added).

114. Note, *Defining “Tender Offer” Under The Williams Act*, 53 BROOKLYN L. REV. 189, 190 (1987) (citing S. REP. NO. 550, 90th Cong., 1st Sess. 3 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 3 (1968)).

115. 1968 U.S. CODE NEWS, *supra* note 1, at 2813.

Investors purchase stock in a corporation for any number of reasons. They choose to sell their stock for as many different reasons. Thus, the best investment decision for one investor may not be the best investment decision for another. A group decision, therefore, should not stop an investor from doing what is in his or her own best interest.

Appellate courts previously have recognized Congress' intent to allow each shareholder the opportunity to make the best investment decision. In *Martin-Marietta Corp. v. Bendix Corp.*, for example, the Sixth Circuit held that by "[n]either favoring incumbent management nor the takeover bidder, Congress adopted a policy of 'evenhandedness,' thereby permitting the investor to make his own *independent* but informed decision whether to sell."¹¹⁶

Congress, in enacting the Williams Act, wanted to avoid "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."¹¹⁷ By permitting group decision making, the state has tipped the balance in favor of management. Allowing a majority of only a quorum of disinterested shareholders to make the decision for every shareholder makes it possible for a potentially very small number of shares to dictate if the takeover may proceed. The smaller the number of shares that can thwart a takeover, the easier management's task of gaining support for its position. All that management need do is convince these few shares to vote against the takeover and the takeover will fail. Before group decision making was permitted, management's task was far greater since more shares had to be convinced to reject the takeover offer. Allowing management to successfully thwart a takeover with less shareholder support tips the balance of regulation in favor of management. Since the Williams Act was enacted expressly to favor neither management nor the person making the takeover offer,¹¹⁸ any state regulation favoring one side over the other is contrary to the intent of the Williams Act.

B. Proposed Amendments To The Williams Act

Congress should respond to the recent trend of state takeover legislation by clarifying the intent of the Williams Act and by directly prohibiting certain control share act provisions. One amendment to the Williams Act should be a more precise definition of Congress' intent. There should be a provision, for example, stating that the Act only intends to protect shareholders from the natural coercive atmosphere of a takeover: that each investor be provided adequate time and information to enable the investor to make the best *personal* investment decision. This amendment would

116. *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 567 (6th Cir. 1982) (emphasis added). See also *Great Western United Corp. v. Kidwell*, 577 F.2d 1256, 1276 (5th Cir.), *rev'd on other grounds*, 443 U.S. 173 (1978); *Fleet Aerospace Corp. v. Holderman*, 637 F. Supp. 742, 758-59 (S.D. Ohio), *aff'd*, 796 F.2d 135 (6th Cir. 1986), *vacated and remanded sub nom. Ohio v. Fleet Aerospace*, 107 S. Ct. 1949 (1987); *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearings on S. 510 Before the Subcommittee on Banking and Commerce*, 90th Cong., 1st Sess. 17, 19, 25, 182 (1967) (statements of Manuel F. Cohen, Chairman, SEC), 113 CONG. REC. 854-55 (1967).

117. 1968 U.S. CODE NEWS, *supra* note 1, at 2813.

118. *Id.*

provide the courts with clear standards to evaluate congressional intent and to evaluate state regulation of takeovers.

Congress also should amend the Williams Act to explicitly forbid states from allowing groups to determine how other security holders may handle their investments. This amendment would promote impartial regulation of takeovers. Both management and persons attempting a takeover would have an equal burden in gaining the necessary support needed either to complete or to stop a potential takeover.¹¹⁹

Corporate law is state-created law and courts have traditionally recognized the states' power to regulate their own corporations and intrastate securities sales and exchanges.¹²⁰ The SEC has "forcefully opposed suggestions to displace fully the authority of the states."¹²¹ The Supreme Court has noted that "[c]orporations are creatures of state law . . . [and] except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."¹²² The proposed amendments, however, do not seek to federalize corporate law. They are merely an attempt to clarify the intent of the Williams Act and to protect shareholders' investments. States are affected by these proposals only to the extent that their statutes conflict with the Williams Act.

These proposed amendments would protect the investors as well as provide an equitable arena for takeover battles. These amendments are also designed to promote economic efficiency.¹²³

C. *The Economic Effects Of The Proposed Amendments*

In analyzing the economic effects of the proposed amendments, it should be noted that the goal of these amendments is to promote economic efficiency in takeover situations. Economic efficiency results when goods and resources are being used where their value is highest.¹²⁴ In this subpart, the Note will examine two benefits shareholders would receive if the proposed amendments were enacted. First, the mere presence of potential offerors benefits shareholders even if no tender offer is made. Second, a takeover battle waged in a fair and impartial arena benefits both the shareholders and society.

119. This author believes that management should also be prohibited from adopting certain antitakeover provisions in the corporation's articles of incorporation. In other words, corporations, through incumbent management, should be prohibited from adopting provisions that would violate the Williams Act if enacted by a state. This argument, however, is beyond the scope of the Williams Act and this Note. For a discussion of this issue, see Easterbrook & Fischel, *The Proper Role of a Target's Management In Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); but cf. Lipton, *Takeover Bids in the Target's Boardroom: A Response to Professors Easterbrook and Fischel*, 55 N.Y.U. L. REV. 1231 (1980).

120. See, e.g., *supra* text accompanying note 45.

121. Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 112 (1987) (citing *Amendments to Tender Offer Rules: All-Holders and Best-Price*, Exchange Act Release No. 23,241, 51 Fed. Reg. 25,873 (July 17, 1986)).

122. *Santa Fe Indus. v. Green*, 430 U.S. 462, 479 (1976) (citing *Cort v. Ash*, 422 U.S. 66, 84 (1975)).

123. See *infra* subpart C.

124. R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 9 (3d ed. 1986).

1. *The Benefits of a Potential Takeover*

From the foregoing discussion of the policy behind the Williams Act, it is apparent that Congress wants security holders to have the relevant information necessary to make the best investment decision. In a perfect market, security holders would constantly monitor management's actions to weigh the effectiveness of their decisions. Shareholders, however, have no incentive to act as monitor. No one shareholder can realize even a small amount of the benefits available from monitoring management since the benefits are dispersed according to each shareholder's investment and not according to his or her monitoring efforts.¹²⁵ Because other shareholders benefit from any one shareholder's monitoring efforts without contributing to the monitoring costs, each shareholder has an incentive to remain passive.¹²⁶ Although individual shareholders do not have an incentive to monitor management, corporate raiders constantly monitor management's activities in order to find a potential target.

The proposed amendments to the Williams Act will prevent states from adopting antitakeover provisions. Without these provisions, potential tender offerors will be "on the lookout" for a good deal and provide the necessary monitoring function. As recognized by Judge Easterbrook and Professor Fischel:

Tender offers are a method of monitoring the work of management teams. Prospective bidders monitor the performance of managerial teams by comparing a corporation's potential value with its value (as reflected by share prices) under current management. When the difference between the market price of a firm's shares and the price those shares might have under different circumstances becomes too great, an outsider can profit by buying the firm and improving its management. The outsider reduces the free riding problem because it owns a majority of the shares. The source of the premium is the reduction in agency costs, which make the firm's assets worth more in the hands of the acquiror than they were worth in the hands of the firm's managers.

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 . . . [S]hareholders benefit even if their corporation never is the subject of a tender offer. The process of monitoring by outsiders poses a continuous threat of takeover if performance lags. Managers will attempt to reduce agency costs in order to reduce the chance of takeover, and the process of reducing agency costs leads to higher prices for shares.¹²⁷

To take advantage of the monitoring benefits realized through the presence of tender offers, states should be prohibited from adopting antitakeover provisions. These provisions reduce shareholders' and society's benefits since shareholders are denied the premium the tender offer would have provided, while society is denied the social gain from the potentially superior use of the corporation's assets.¹²⁸

125. Easterbrook & Fischel, *supra* note 119, at 1171.

126. *Id.*

127. *Id.* at 1173-74. Agency costs are the costs to the principal of obtaining faithful and effective performance by his agents. POSNER, *supra* note 124, at 368. Having someone benefit from the work of another without sharing in the costs is referred to as "free riding." *Id.* at 55.

128. Easterbrook & Fischel, *supra* note 119, at 1174-75. Takeovers, on the average, are good for the shareholders and the economy. Studies have shown that companies involved in takeovers experience abnormal stock price increases. For a detailed study of the effects to shareholders and the economy, see Jensen, *Takeovers: Folklore and Science*, 62 HARV. BUS. REV. 109 (Nov./Dec. 1984).

2. Increased Efficiency Through Fair Takeover Battles

The goal of the proposed amendments is to increase economic efficiency in takeover situations.¹²⁹ Antitakeover devices have been defended on the basis that the acquiring corporation will not use the target's resources any more productively than incumbent management.¹³⁰ In fact, it is impossible to determine who will utilize the target's resources most efficiently without the benefit of hindsight. Since such a determination is impossible, the best means of making the decision is to allow the free market to decide. The free market will allow the person who most values the target's resources to have them. In a takeover situation, both incumbent management and the tender offeror will assess how much they value having control of the corporation. This assessment will include the value of the corporation's resources and how these resources will be utilized under incumbent management or the tender offeror's control. Then, incumbent management¹³¹ and the tender offeror will engage in a bidding war until the person who values the corporation more wins. Meanwhile, the shareholders will recognize the premiums of the bidding process through an increase in the share price.

Congress should act to promote economic efficiency. This can be done only through promoting impartial legislation. States should be prohibited from helping their corporations at the expense of the corporation's shareholders. Corporations take a risk by selling ownership to the public and the threat of losing control of the corporation is simply part of that risk. Shareholders do need protection from the coercive nature of a takeover; however, they also need protection from states and management that would lower the value of their investment.

VII. CONCLUSION

In enacting the Williams Act, Congress was concerned with the natural coercive nature of a tender offer. Congress sought to provide shareholders with adequate time and information to enable them to make the best investment decision. Since the enactment of the Williams Act, states have passed statutes aimed at protecting their corporations from hostile takeovers. These protectionist statutes have been justified as protecting the shareholders. These statutes, however, have been challenged as violating the Constitution and as being inconsistent with the Williams Act. The trend of current judicial decisions is to permit progressively more protectionist statutes. Recently, for example, Delaware has proposed an antitakeover statute that could delay a takeover attempt up to three years.¹³²

129. See *supra* text accompanying note 124.

130. See Lipton, *supra* note 119.

131. Incumbent management is prohibited from attempting to maintain control through the use of corporate funds. See, *Edelman v. Fruehauf Corp.*, 798 F.2d 882 (6th Cir. 1986). If incumbent management wishes to maintain control, they must find alternative financing.

132. Delaware proposed a new takeover law which will stall an unwanted buyer who acquires more than 15% of a target company's stock from completing the takeover for three years. There are three exceptions to this rule:

1. if the buyer purchases 85% of the stock, excluding shares held by directors who are officers and certain shares held under employee stock plans;

These statutes are contrary to the intent of the Williams Act and promote inefficiencies in the marketplace. The Williams Act should be amended to state more specifically its intent and eliminate the ambiguity that has allowed states and courts to justify these harmful statutes. The focus of the legislation should be to protect the shareholders as well as to promote economic efficiency. Until this is done, states will be permitted to help their corporations at the expense of the shareholders.

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2. if two-thirds of the voting shares at a special election vote for the acquisition; or

3. if the board of directors opt out from the provisions of the statute.

Del. Code Ann. tit.8, § 203 (1988); See Labaton, *Debate Over A New Takeover Law*, N. Y. Times, Feb. 1, 1988, at D1, col. 3.

